CORRECTED COPY

No. 80-2078.

IN THE

Supreme Court of the United States

October Term, 1981

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA and THE UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF DANIEL, MANN, JOHNSON & MENDENHALL, a California corporation, together with BRIEF AMICUS CURIAE.

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Daniel, Mann, Johnson & Mendenhall, a California corporation (''DMJM''), hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of Petitioner as provided in Rule 36 of the Rules of this Court. This applicant believes that consent would be given by all parties hereto, but the time schedule set in this case will not permit the procedure for such consent to be obtained for a timely filing of this brief, leaving only this motion as the means for presentation thereof.

DMJM has an interest in this case in that it is a plaintiff in an action which was consolidated with Petitioner's in the United States District Court, Central District of California,

DANIEL, MANN, JOHNSON & MENDENHALL v. DONALD T. REGAN, et al., CV-81-1101-LEW, which case was dismissed upon motion by the Government, as was the instant case of Petitioner's. Both cases are presently before the Ninth Circuit Court of Appeals. Underlying the DMJM case is *DANIEL, MANN, JOHNSON & MENDENHALL v. IMPERIAL GOVERNMENT OF IRAN, et al.*, CV-80-0277-LEW, which, along with Petitioner's underlying action, was suspended by the Court, with the attachment and garnishment of DMJM's and Petitioner's judgment having been vacated. The Government was enjoined by the Court from proceeding with any transfer or interference with the attached assets during the pendency of DMJM's and Petitioner's appeals.

There are distinctions between the Dames & Moore ("D&M") and DMJM cases, despite general similarities. It is within these distinguishing areas that certain artificial limitations could occur in a possible holding by this Court.

There are differences regarding the forum selection provisions in the subject contracts. There is the additional fact that Petitioner holds a judgment in its underlying case whereas DMJM has an attachment and garnishment. Aside from these and other substantive distinctions, there is some diversity in the approaches to legal analysis by DMJM and Petitioner. For example, Petitioner questions, as a primary gambit, the President's authority to "settle legally enforceable claims of American citizens against foreign states . . ." DMJM would ask this question another way: "Does the President have the authority, or even more succinctly stated, the constitutional leave, to intrude upon the jurisdiction of Article III Courts once lawfully obtained?" The other questions asked might be so interdependent upon the first one as to be inseparable. If the President has certain rights under some conditions to invade the Courts' precincts,

the next question would need to be addressed. Does the President have the authority to void or nullify lawful orders of the Courts? If such authority could be found and assuming it passes constitutional muster, the final question should be asked: "does the President have the right and constitutional sanction to deprive litigants before the Court of their vested property rights?" The latter issue presumes that assets under garnishment constitute "property rights." *Armstrong v. United States*, 364 U.S. 40, 80 S.Ct. 1563.

DMJM is informed that Petitioner is only one of two plaintiffs among the several hundred in relevant cases which hold judgments in underlying cases. DMJM has further information that the other litigant had obtained an attachment prior to the assets "freeze" under the Iranian Assets Control Regulations, November 14, 1979. See *Electronic Data Systems, etc. v. The Social Security Organization . . . Iran*, 508 F.Supp. 1350, 1360.

On the other hand, DMJM is more representative of the remainder of the several hundred U.S. litigants, who do not hold judgments and whose attachments and garnishments postdate the "freeze." DMJM respectfully suggests that a ruling by this Court which encompasses the maximum number of issues extending over the greatest number of these cases possible would best accomplish the purpose sought by all parties in urging this Court to grant certiorari to Petitioner.

In addition to DMJM's patent qualification for the filing of its brief as *amicus* under Rule 36, there is the more compelling public interest factor to be served. If some perspective may be added hereby to help bring the confused borders of the Separation of Powers doctrine into sharper focus, so that future mischief by successor Presidents may be avoided, that may be sufficient unto itself.

For these reasons, DMJM asks that its attached *amicus curiae* brief be ordered filed.

DATED: June 16, 1981.

Respectfully submitted,

GERALD M. SINGER,

Attorney for Applicant, Daniel, Mann, Johnson & Mendenhall.

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Questions Presented.

This case presents questions which are vital to the life of the United States Constitution. The following questions should be presented in augmentation to those now before the Court as stated in Petitioner's Brief:

1. Whether the Constitution grants to the Congress the right to permit the President to intrude upon the jurisdiction of Article III Courts, once lawfully obtained.

2. Whether the Congress does in fact purport to authorize the President to intrude upon the jurisdiction of

Article III Courts once that jurisdiction has been lawfully obtained.

3. Whether the President has the inherent power under the Constitution to invade the jurisdiction of Article III Courts once lawfully obtained.

4. Whether assets subject to attachments and garnishments under Article III Court orders, are property rights vested in litigants which are protected by the Fifth Amendment of the Constitution and beyond the reach of the President acting within his power to negotiate and settle foreign claims or to effectuate the release of U.S. citizens held by foreign powers.

Interest of the Amicus Curiae.

Applicant, DANIEL, MANN, JOHNSON & MENDENHALL ("DMJM"), is in a situation comparable to Petitioner, DAMES & MOORE. Indeed, such differences as do exist between DMJM's and "D&M's" cases would emphasize the pervasiveness of the issues assigned in D&M's brief and the grave constitutional questions raised in these and the other hundreds of matters now pending before courts across the nation, containing similar issues.

DMJM's action, *Daniel, Mann, Johnson & Mendenhall v. Donald T. Regan, et al.*, CV-81-1101-Lew was filed in the United States District Court, Central District of California on March 5, 1981, along with a briefed motion for preliminary injunction to enjoin defendants from proceeding with their announced vacating of DMJM's attachment and garnishment and the suspension of its underlying case, *Daniel, Mann, Johnson & Mendenhall v. Imperial Government of Iran, et al.*, CV-80-0277-LEW.

Thereafter, Petitioner, D&M filed an *amicus curiae* brief in DMJM's case in support of DMJM's motion for injunction, on April 28, 1981. Subsequently, D&M filed an action

against Donald T. Regan and the United States, alleging essentially the same facts as in DMJM's case and the two cases were consolidated on D&M's request. On June 2, 1981, the Court denied the relief sought in both cases and granted a motion by defendants to suspend the underlying cases of both plaintiffs and vacate the attachments in both and the judgment in D&M's case. DMJM filed immediate appeals of judgments in its cases.

A motion by DMJM upon an order shortening time to enjoin defendants from transferring or otherwise interfering with the assets subject to its attachment during the pendency of its appeal, was granted by the Court on June 11, 1981.

The differences appearing in DMJM's and D&M's cases offer the possibility, inadvertent or otherwise, that a decision by this Court may somehow fall short of full applicability to DMJM's case. D&M holds a judgment in its underlying case whereas DMJM has an attachment and garnishment. Language to the effect of prohibiting interference with or nullification of a "judgment" could be construed as not applicable to an attachment or garnishment. This is not perceived as tracking any particular distinctions in statutes or court rules, since presumably all court orders enjoy equal jurisdictional status. But, confusion could occur and distinctions may exist in the minds of judges and in subsequent rulings.

There also appear to be some arguable differences in the phrasing of the "forum selection" provisions in the contracts which are subject to DMJM's and D&M's underlying cases. Since the "right" of arbitration under the proposed neutral arbitration tribunal will be preliminarily dictated by that language, such differences could be crucial.

DMJM respectfully suggests that its case is even more representative of the other hundreds of cases now pending

in various courts against Iranian defendants than D&M's. Only two of these cases involve judgments, the others involve no more than attachments and garnishments.

DMJM is not suggesting that the interpretation of the "forum selection" language in these two cases would be more or less favorable for either in respect of arbitration since DMJM, at least, does not consider that advent as one devoutly to be wished.

ARGUMENT.

1. The Congress can confer and redefine the jurisdiction of United States Courts. *Palmore v. United States*, 411 U.S. 389, 401 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). This is not disputed. But, Congress cannot authorize interference with the jurisdiction of Article III Courts once that jurisdiction has been derived from lawful criteria. In fact, Congress cannot even withhold or restrict jurisdiction *prior* to its grant if that jurisdiction is necessary to the maintenance of life, liberty or property rights. If it is necessary to the national interest to deprive property rights, then such deprivation must be compensated as per the Fifth Amendment. *Battaglia v. General Motors Corporation*, 169 F.2d 254, 257 (2d Cir.), *cert. den.* 335 U.S. 887 (1948).

The power to adjudicate the issues raised in these cases derives from Article III of the Constitution and from the Foreign Sovereign Immunities Act (''FSIA''). Hence, since jurisdiction was lawfully obtained by the District Court in these matters, Defendants were without right and in violation of Articles II and III of the U.S. Constitution in interference therewith. Moreover, even had Congress purported to grant to Defendants the ''right'' to intrude upon that Court, such a grant would have been repugnant to the Constitution.

2. Defendants have taken the position that the President did in fact have power to innovate Executive Order No. 12279 which articulates the authority under which the rulings against DMJM and D&M were grounded. The primary source of such authority is indexed as the International Emergency Economic Powers Act (''IEEPA''), 50 U.S.C. §§1701 *et seq.*

Defendants fail to point out any specific language therein which would authorize the President to tamper with the

exercised jurisdiction of an Article III Court or to deprive any litigant thereunder of any vested property right. Indeed, no such language exists in that or any other statute. In fact, the grant of authorities under IEEPA expressly excluded certain authorities granted to the President under the previous Act, §5(b), Trading With The Enemy Act. The powers under that Act included the power to "vest, *i.e.*, to take title to foreign property." That power was specifically excluded from the subsequent Act in an obvious move to limit presidential powers. Although IEEPA still gives the President the power to "freeze" foreign assets, he notably does not have the power to "seize" such assets. But, beyond this, there is certainly no language in that Act which would authorize the intrusion into the Court's jurisdiction to do anything whatever with any property. Nor indeed does the Constitution permit such language. Such authority was likewise absent from the prior Trading With The Enemy Act.

3. Defendants suggest the outrageous contention that the President has the "plenary" power to deal with assets which are within the Court's custody under lawful attachment orders, in the manner outlined under Executive Order 12279, in his "inherent presidential powers." Significantly absent from such claims, as in all of Defendants' arguments, is any reference to specific sources of such "inherent power." Certainly, no such "power" stems from either Article II or Article III of the U.S. Constitution.

The case repeatedly relied upon by Defendants for their urging that the President's power is at its highest when supported by the expressed will of Congress, is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). But, that case is demonstrably misplaced. First, that case involved the question of the Executive Branch moving into the provinces of the Legislative Branch, not the Judicial Branch. There is no dispute that the President can act in

matters reserved to the Congress with permission given by the Congress. Similarly, the President may issue orders which normally may only be considered by the Courts, with approval expressly given by the Courts. But Congress cannot sanctify intrusions into the Judicial Branch by the President. Even if the interpretation of *Youngstown* by Defendants were correct, which it is not, there would be no applicability to this case.

Second, *Youngstown* did not hold that the President was empowered to vest foreign assets in the custody and control of the Executive Branch. Further, there is no logical application of any of the *Youngstown* facts to the divesting of property interests held by either D&M or DMJM which interests were subject to adjudication by the Court.

There can be little doubt but that both D&M and DMJM have property interests in their respective lien orders issued by the District Court, and which interests are cognizable under the Fifth Amendment. *Armstrong v. United States*, 364 U.S. 40 (1960).

In summary, there is no authority given to the President, either present under the President's "inherent powers" or granted by the Congress which empowers the President to (a) countermand or invalidate lawful orders of Article III Courts issued pursuant to any lawful jurisdictional ground, (b) to interfere with the valid exercise of Congressionally granted jurisdiction by Article III Courts, (c) vest foreign assets located in the United States in the custody and control of the Executive Branch, or (d) to confiscate the property interests of any citizen without just compensation as required by the Fifth Amendment.

4. Lastly, the several hundred cases which will all be directly affected by this Court's ruling, present only part of the mischief which could result. Lower court rulings thus

far in these cases have offered the very first definitive judgments which broadly state that the President has the right to puncture the seal which insulates the Branches of Government. What far-reaching effects might occur under future administrations cannot be foretold. But, that they will be contrary to the meaning and intent of the doctrine which has separated the Branches for two hundred years, and which has been responsible in no little way for the maintenance of our Constitutional form of Government must be patently obvious.

Conclusion.

The orders filed against D&M and DMJM entered June 2, 1981 should be reversed upon a writ issued as prayed in Petitioner's Brief.

DATED: June 16, 1981.

GERALD M. SINGER,

Attorney for Applicant, Daniel, Mann, Johnson & Mendenhall.